

STATE OF CALIFORNIA

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OFFICE OF ADMINISTRATIVE LAW

2008 OAL DETERMINATION NO. 34
(OAL FILE # CTU 2008-0717-01)

REQUESTED BY: Martin Martinez

CONCERNING: Memorandum issued by the California Department of Corrections and Rehabilitation titled "Unauthorized Possession of Razor Blades by Inmates Housed in Administrative Segregation Units, Psychiatric Services Units, or in Security Housing Units."

Determination Issued Pursuant to Government Code Section 11340.5.

SCOPE OF REVIEW

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. Our review is limited to the sole issue of whether the challenged rule meets the definition of a "regulation" as defined in Government Code section 11342.600¹ and is subject to the Administrative Procedure Act (APA). If a rule meets the definition of a "regulation," but was not adopted pursuant to the APA and should have been, it is an "underground regulation" as defined in California Code of Regulations, title 1, section 250.² OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

¹ Government Code section 11342.600 states:

"Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

² California Code of Regulations, title 1, section 250, subdivision (a) defines "underground regulation:"

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

CHALLENGED RULE

On July 17, 2008, Mr. Martinez (Petitioner) submitted a petition to OAL challenging a memorandum dated February 21, 2002, titled “Unauthorized Possession of Razor Blades by Inmates Housed in Administrative Segregation Units, Psychiatric Services Units, or in Security Housing Units” (Memorandum).³ It was issued by the Acting Deputy Director of the Institutions Division of the California Department of Corrections and Rehabilitation (CDCR). The Memorandum provides that:

- Inmates having unauthorized possession of a razor blade while on Security Housing Unit (SHU) status, Psychiatric Services Unit (PSU) status, or Administrative Segregation Unit (ASU) may be charged with “Possession of a Deadly Weapon,” a Division A-1 offense.⁴ [First part of Memorandum]
- Incidents involving inmates housed in general population having unauthorized possession of a razor blade altered from its original manufactured state should be evaluated on a case-by-case basis. Absent evidence or information which would indicate the razor blade was intended to be used as a weapon, a more appropriate charge may be “Possession of Contraband,” a Division C offense.⁵ [Second part of Memorandum]

The Petitioner alleges that the Memorandum meets the definition of a “regulation” that should have been adopted pursuant to the APA.

DETERMINATION

OAL determines that the first part of the Memorandum, dealing with the possession of a razor blade by inmates in the SHU, PSU or ASU, is exempt from the requirements of the APA pursuant to Government Code section 11340.9, because it is the only legally tenable interpretation of existing law. The second part of the Memorandum, dealing with the possession of a razor blade by inmates in the general population, does not meet the definition of a “regulation” in Government Code section 11342.600 because it establishes that such incidents will be evaluated on a case-by-case basis.

³ A copy of the Memorandum is included with this Determination as Attachment 1.

⁴ For ease of reference, we will refer to the part of the Memorandum addressing inmates housed in the SHU, ASU or PSU as the first part of the Memorandum, and the part of the Memorandum addressing inmates housed in the general population as the second part of the Memorandum.

⁵ California Code of Regulations, title 15, section 3323, establishes a schedule of forfeitures of credit for a finding of guilt for a serious rule violation. Division A-1 includes the most serious offenses such as murder, manslaughter, battery, assault or battery with a deadly weapon, etc. Division C includes lesser offenses such as escape without force from a camp, attempted extortion by means of threat, arson, and bribery.

FACTUAL BACKGROUND

On February 21, 2002, the Acting Deputy Director of the Institutions Division of CDCR issued the Memorandum to provide instruction “regarding razor blades defined as dangerous contraband or weapons.”

On July 17, 2008, Petitioner submitted the petition to OAL challenging the Memorandum as an underground regulation. On August 13, 2008, OAL accepted the petition for consideration. The acceptance was published in the California Regulatory Notice Register on August 29, 2008.

OAL received no comments from the public.

On August 25, 2008, CDCR submitted a response to the petition. CDCR argues that the Memorandum is not an underground regulation. The response acknowledges that possession of a razor blade is not specifically included as a Division A-I offense in California Code of Regulations, title 15, section 3323. However, the possession of a razor blade in the SHU is specifically designated as a deadly weapon in the classification requirements in California Code of Regulations, title 15, section 3375.3(b)(4)(F)1. Therefore, possession of a razor blade must be considered a Division A-1 offense.

The Petitioner did not submit a rebuttal to CDCR’s arguments.

UNDERGROUND REGULATIONS

Section 11340.5, subdivision (a), prohibits state agencies from issuing rules unless the rules comply with the APA:

(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of section 11340.5 it creates an underground regulation as defined in California Code of Regulations, title 1, section 250.

OAL may issue a determination as to whether or not an agency issued, utilized, enforced, or attempted to enforce a rule that meets the definition of a "regulation" as defined in Government Code section 11342.600 that should have been adopted pursuant to the

APA. An OAL determination that an agency has issued, utilized, enforced, or attempted to enforce an underground regulation is not enforceable against the agency through any formal administrative means, but it is entitled to “due deference” in any subsequent litigation of the issue pursuant to *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244.

To determine whether an agency issued, utilized, enforced, or attempted to enforce an underground regulation in violation of Government Code section 11340.5, it must be demonstrated that the agency rule is a “regulation” and not exempt from the APA.

ANALYSIS

A determination of whether the challenged rule is a “regulation” subject to the APA depends on (1) whether the challenged rule is a “regulation” within the meaning of Government Code section 11342.600, and (2) whether the challenged rule falls within any recognized exemption from APA requirements.

A regulation is defined in Government Code section 11342.600 as:

... every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

In *Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4th 557, 571, the California Supreme Court found that:

A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (Gov. Code, § 11342, subd. (g)).

The first element of a regulation is whether the rule applies generally. As *Tidewater* points out, a rule need not apply to all persons in the state of California. It is sufficient if the rule applies to a clearly defined class of persons or situations. By its own terms, the first part of the Memorandum applies to all inmates housed in SHU, ASU or PSU. These inmates are a clearly defined class of persons. The first element is, therefore, met for the first part of the Memorandum.

The second part of the Memorandum requires that inmates in the general population in possession of a razor blade altered from its original manufactured state be evaluated on a case-by-case basis. A rule enforced on a case-by-case basis is not a rule of general

application because the enforcement of the rule is dependent on the unique circumstances of each individual situation. In this case, each inmate in possession of an altered razor blade in the general population is evaluated individually to determine the appropriate level of discipline. The second part of the Memorandum relating to the possession of a razor blade in the general population is not a rule of general application. The first element of *Tidewater* is not met, and therefore, we do not need to address the second element of *Tidewater* for this part of the Memorandum.

The second element established in *Tidewater* is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency's procedure. Penal Code section 5054 states:

Commencing July 1, 2005, the supervision, management and control of the state prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the Secretary of the Department of Corrections and Rehabilitation.

In addition, Penal Code section 5058(a) states:

The director may prescribe and amend rules and regulations for the administration of the prisons and for the administration of the parole of persons sentenced under Section 1170 except those persons who meet the criteria set forth in Section 2962.

The rules and regulations shall be promulgated and filed pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, except as otherwise provided in this section and Sections 5058.1 to 5058.3, inclusive. All rules and regulations shall, to the extent practical, be stated in language that is easily understood by the general public.⁶

Pursuant to these statutes, CDCR is authorized to specify disciplinary offenses and penalties for inmates. The Memorandum deals with the disciplinary offense of possession of a razor blade and the penalty for a conviction. Thus, it implements, interprets or makes specific Penal Code sections 5054 and 5058, the law enforced or administered by CDCR.

The second element in *Tidewater* is, therefore, met for the first part of the Memorandum dealing with inmates housed in the SHU, ASU or PSU.

Having met both elements of *Tidewater*, OAL determines that the first part of the Memorandum meets the definition of "regulation" in Government Code section 11342.600. The second part of the Memorandum failed to meet the first element

⁶ In 2005, the Department of Corrections was reorganized and renamed. The new Department of Corrections and Rehabilitation succeeded to all the powers and duties of the Department of Corrections pursuant to Penal Code section 5050.

of *Tidewater*, and therefore, is not a “regulation”. A challenged rule must meet both elements of *Tidewater* to meet the definition of “regulation.”

The final issue to examine is whether the first part of the Memorandum falls within an exemption from the APA. Government Code section 11346 requires that an exemption from the APA must be an express statutory exemption. Pursuant to Government Code section 11340.9(f) the APA does not apply to a regulation that embodies the only legally tenable interpretation of a provision of law. While CDCR did not raise the issue of whether the Memorandum contains the only legally tenable interpretation of a provision of law, OAL has identified it as a relevant issue as it relates to the first part of the Memorandum.

The California Supreme Court discussed the “only legally tenable interpretation” exception in *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 328, 132 P.3d 249. The court stated:

...the exception for the lone “legally tenable” reading of the law applies only in situations where the law “can reasonably be read only one way” (1989 Off. Admin. Law Determination No. 15, Cal. Reg. Notice Register 89, No. 44-Z, pp. 3122, 3124), such that the agency's actions or decisions in applying the law are essentially rote, ministerial, or otherwise patently compelled by, or repetitive of, the statute's plain language. (See Cal. Law Revision Com. com., 32D West's Ann. Gov.Code (2005 ed.) foll. § 11340.9, p. 94; 1989 Off. Admin. Law Determination No. 15, Cal. Reg. Notice Register 89, No. 44-Z, pp. 3124-3131 [reviewing an agency interpretation of the law for compliance with the APA and concluding that although the agency had a “well-supported” rationale for its view, it was not the only legally tenable interpretation of the pertinent statute].)

OAL has previously considered a similar issue concerning the possession of razor blades in the SHU. In 1998 OAL Determination No. 44, OAL found that including a razor blade as a sharp instrument pursuant to Penal Code section 4502(a) constitutes a deadly weapon making possession of a razor blade in the SHU an A-I offense subject to credit forfeiture was the only reasonable interpretation of California Code of Regulations, title 15, section 3323.⁷

The determination discussed Penal Code section 4502 (a) which states:

⁷ The concept of “only reasonable interpretation” was codified as “only legally tenable interpretation” in Government Code section 11340.9(f), in 2000. The principle was recognized by the courts in *Englemann v. State Board of Education* (1991) 2 Cal.App.4th 47, and was consistent with OAL’s practice. (See the California Law Revision Comment following Government Code section 11340.9.)

Every person who, while at or confined in any penal institution ...possesses or carries upon his or her person or has under his or her custody or control ... any dirk or dagger or *sharp instrument*, ... is guilty of a felony... (Emphasis added.)

California Code of Regulations, title 15, section 3323 states:

- (a) Upon a finding of guilt of a serious rule violation, a credit forfeiture against any determinate term of imprisonment or any minimum eligible parole date for an inmate sentenced to an indeterminate sentence, as defined in section 3000 Indeterminate Sentence Law (ISL), shall be assessed within the ranges specified in (b) through (h) below:
- (b) Division "A-1" offenses; credit forfeiture of 181-360 days.

....

(8) Possession, manufacture, or attempted manufacture of a *deadly weapon* or explosive device. (Emphasis added.)

Specifically, 1998 OAL Determination No. 44 stated:

Although the courts have not specifically addressed the issue whether an unaltered razor blade constitutes a “dirk, dagger, or sharp instrument” under Penal Code section 4502, in *People v. Elguera*⁸ the prosecution of an inmate for possessing a sharp instrument while confined in state prison, centered on the issue whether the inmate knew that inside the paper packet was a razor blade. There was no question as to whether the razor blade met the definition of a sharp instrument.

The court in *Elguera* certainly implies that including a razor blade (as is) within the definition of a “sharp instrument” does not interpret or make specific Penal Code section 4502, but is the only reasonable interpretation of the phrase “sharp instrument.” Logic also mandates that a razor blade not only is a “sharp instrument,” but is also a “deadly weapon,” regardless of whether the razor blade has had a handle affixed to it. Accordingly, the Pelican Bay State Prison rule that provided for the forfeiture of up to 181 days of credit for a finding of guilt for possession of a razor blade is not an embellishment upon Title 15, CCR, section 3323, which provided for forfeiture of 181-360 days of credit time for a finding of guilt for possession of a “deadly weapon.” Since the challenged rule is merely restating the law, and is not implementing, interpreting, or making the law specific, the rule [classifying the possession of a razor blade as a Division

⁸ *People v. Elguera* (1992) 8 Cal.App.4th 1214.

A-1 offense] does not satisfy the second part of OAL's two-part test of a "regulation."

Consequently, OAL concludes that *the challenged rule concerning the forfeiture of credit time for inmates found guilty of possession of an unaltered razor blade is not a "regulation" within the meaning of the APA. The challenged rule is... the [only] reasonable interpretation of an existing regulation*, which was adopted pursuant to the APA, and codified in the Code of Regulations, which provides for the forfeiture of credit time for inmates found guilty of possession of a deadly weapon. (Emphasis in original.)

For these reasons, we find that the first part of the Memorandum which requires that inmates in SHU, ASU or PSU who have unauthorized possession of a razor blade be charged with a Division A-1 offense for possession of a razor blade is the only legally tenable interpretation of California Code of Regulations, title 15, section 3323. Accordingly, a valid exemption applies and the first part of the Memorandum is not subject to the APA.

OAL, therefore, determines that the first part of the Memorandum, dealing with the possession of a razor blade by inmates in the Security Housing Unit, Psychiatric Services Unit or Administrative Services Unit is exempt from the requirements of the APA pursuant to Government Code section 11340.9, because it is the only legally tenable interpretation of existing law. The second part of the Memorandum dealing with the possession of a razor blade by inmates in the general population, does not meet the definition of a "regulation" in Government Code section 11342.600 because it establishes that such inmates will be evaluated on a case-by-case basis, and therefore, is not a general rule.

AGENCY RESPONSE

The response acknowledges that unauthorized possession of a razor blade is not specifically included as an A-1 offense in California Code of Regulations, title 15, section 3323. However, the Department argues that the possession of a razor blade in the SHU, ASU or PSU is specifically designated as a deadly weapon in the classification requirements in California Code of Regulations, title 15, section 3375.3(b)(4)(F)1. Therefore, unauthorized possession of a razor blade must be considered a Division A-1 offense. The classification process is used throughout the inmate's incarceration to determine the appropriate custody level and placement.⁹

⁹ The classification process is explained in California Code of Regulations, title 15, section 3375:

(a) The classification process shall be uniformly applied, commencing upon reception of a person committed to the custody of the director and shall continue throughout the time the individual remains under the director's jurisdiction. Each inmate shall be individually classified in accordance with this article.

....

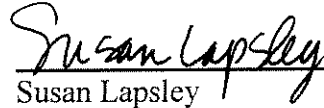
We note, however, that the decision to charge an inmate with a Division A-1 offense is made before the Classification Score Sheet is filled out. The score imposed on the score sheet is the consequence of the Division A-1 offense. It is not the definition of the offense. We do not find, therefore, that the Department's argument is persuasive.

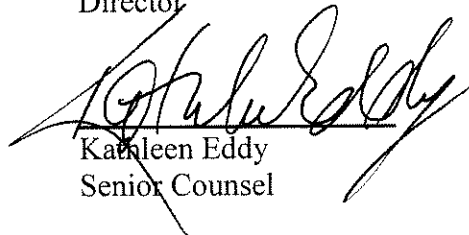
CONCLUSION

OAL finds that the first part of the Memorandum dealing with the possession of a razor blade by inmates in the SHU, ASU or PHU meets the definition of a regulation in Government Code section 11342.600, however it is exempt from the requirements of the APA pursuant to Government Code section 11340.9, as the only legally tenable interpretation of law. The second part of the Memorandum, dealing with the possession of a razor blade by inmates in the general population, does not meet the definition of a "regulation" in Government Code section 11342.600 because it is not a rule of general application.

Date: December 23, 2008

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(c) Each determination affecting an inmate's placement within a [sic] institution/facility, transfer between facilities, program participation, privilege groups, or custody designation shall be made by a classification committee composed of staff knowledgeable in the classification process.

(d) The classification of felon inmates shall include the classification score system as established. A lower placement score indicates lesser security control needs and a higher placement score indicates greater security control needs.

....

California Code of Regulations, title 15, section 3375.3 provides the detailed instructions for completing the Classification Score Sheet, Form 839. Subdivision (b)(4)(F)I requires that for each possession of a deadly weapon:

1. Four points shall be entered in Boxes 59-60 for each well documented incident of an inmate's manufacture or possession of a deadly weapon where apparent use was intended
.... Include possession of a razor blade (whether modified or not) in a segregated program-housing unit (e.g. Administrative Segregation Unit, Security Housing Unit, Psychiatric Services Unit, etc.)

ATTACHMENT 1

As provided by Petitioner

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State of California

Memorandum

Date February 21, 2002

To Wardens

Subject **UNAUTHORIZED POSSESSION OF RAZOR BLADES BY INMATES HOUSED IN ADMINISTRATIVE SEGREGATION UNITS, PSYCHIATRIC SERVICES UNITS, OR SECURITY HOUSING UNITS**

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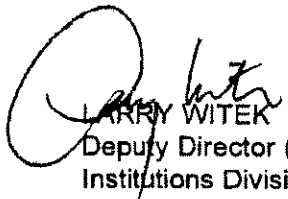
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This memorandum will supercede instructions provided in two previous memorandums dated September 27, 1996, and January 21, 1997, by David Tristan, Deputy Director, Institutions Division, regarding razor blades defined as dangerous contraband or weapons.

Effective immediately, inmates having unauthorized possession of a razor blade(s) while on Security Housing Unit (SHU) status, Psychiatric Services Unit (PSU) status, or Administrative Segregation Unit (ASU) status may be charged with "Possession of a Deadly Weapon," a Division "A-1" offense. Additionally, any inmate attempting to introduce razor blades into any unit, or portion of a unit designated for segregated housing, to include PSU, ASU, or SHU as described in California Code of Regulations (CCR) Section 3335 and Section 3341.5, may also be charged with the Division "A-1" offense. This will include inmates being placed on Disciplinary Detention Unit (DDU) status as the result of a disciplinary hearing disposition. Modification to the razor blade, i.e., attachment of a handle or other alteration beyond removing the razor blade from its manufactured casing, is not required to support this charge.

Incidents involving inmates housed in general population having unauthorized possession of a razor blade altered from its original manufactured state should be evaluated on a case-by-case basis. Absent evidence or information which would indicate the razor blade was intended to be used as a weapon, a more appropriate charge in these types of instances may be "Possession of Contraband," as described in CCR, Section 3323(e)(3), a Division "C" offense.

Any questions regarding this memorandum should be directed to Tim Rougeux, Chief, Institution Services Unit (ISU), or Gloria Colden-Hickman, Facility Captain, ISU, at (916) 323-6828.


LARRY WITEK
Deputy Director (A)
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